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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JEFFREY WALTERS,

Plaintiff,

vs.

ROLL'N OILFIELD INDUSTRIES, LTD,
a foreign corporation, and
NORDIC WELL SERVICING, INC., a
foreign corporation,
Defendants.

Civ. No. 06-1502-TC

OPINION AND ORDER

COFFIN, Magistrate Judge.

Before the court is defendants' motion for summary judgment (#31). Based on reasons that follow, the motion is granted in part and denied in part.

Factual Background

Plaintiff worked as a roustabout for defendants from September 6, 2005, until his termination the following month. The summary judgment record indicates that he performed manual labor on the drill platform of a gas drilling rig in Coos Bay. Plaintiff asserts that shortly after his employment began, he noticed safety hazards on the rig and advised his immediate supervisors, Hanson and Menapace. Plaintiff also states that he took photographs in order to document safety hazards. Defendants contend that plaintiff's camera use during work time was evidence of his poor work ethic. Defendants state that plaintiff took

1 phone calls during work, leaving others to assume his
2 responsibilities, and they state that crew leaders received
3 complaints about plaintiff's work ethic.

4 In September 2005, plaintiff met with the rig manager,
5 McGeehan, who instructed him to stop taking photographs on the
6 rig. Sometime thereafter, McGeehan wrote in his work journal,
7 "[Plaintiff] was taking pictures on rig talk to [another rig
8 manager] about keeping here I would let him go. Talked a lot
9 about labor laws to other hands." Defendants maintain that
10 safety was a primary concern in the workplace, and plaintiff's
11 safety reporting was welcome and taken into consideration.

12 On October 24, plaintiff received a letter from the
13 president of defendant Nordic Well Servicing Inc. terminating
14 him. Plaintiff contends that he was terminated in retaliation
15 for raising safety concerns, whereas defendants contend that
16 plaintiff was terminated for taking photographs and conducting
17 phone conversations while at work, and for exhibiting a poor work
18 ethic.

19 Plaintiff reported his termination to the Oregon Bureau of
20 Labor and Industries (BOLI) on November 2, 2005, and asserted
21 that it was retaliatory. He later submitted an employment
22 discrimination questionnaire to BOLI describing his safety
23 concerns and termination and then filed a formal BOLI complaint
24 in December 2005.

25 Plaintiff initiated this action in October 2006. He brings
26 two claims: retaliation for reporting safety violations under
27 Or. Rev. Stat. § 652.062 and wrongful termination. Defendants
move for summary judgment on both claims based on purely legal
questions. For the reasons that follow, defendants' motion is

granted in part and denied in part.

Standard

1 Summary judgment is appropriate where "there is no genuine
2 issue as to any material fact and . . . the moving party is
3 entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).
4 On a motion for summary judgment, all reasonable doubt as to the
5 existence of a genuine issue of fact is resolved against the moving
6 party, Hector v. Wiens, 533 F.2d 429, 432 (9th Cir. 1976), and any
7 inferences drawn from the underlying facts are viewed in the light
8 most favorable to the nonmoving party. Valadingham v. Bojorquez,
9 866 F.2d 1135, 1137 (9th Cir. 1989).

10 The initial burden is on the moving party to point out the
11 absence of any genuine issue of material fact. Once the initial
12 burden is satisfied, the burden shifts to the opponent to
13 demonstrate through the production of probative evidence that there
14 remains an issue of fact to be tried. Celotex Corp. v. Catrett,
15 477 U.S. 317, 323 (1986).

16 Rule 56(c) mandates the entry of summary judgment against a
17 party who fails to make a showing sufficient to establish the
18 existence of an element essential to that party's case, and on
19 which that party will bear the burden of proof at trial. In such a
20 situation, there can be "no genuine issue as to any material fact,"
21 since a complete failure of proof concerning an essential element
22 of the nonmoving party's case necessarily renders all other facts
23 immaterial. The moving party is "entitled to a judgment as a
24 matter of law" because the nonmoving party has failed to make a
25 sufficient showing on an essential element of her case with respect
26 to which she has the burden of proof. Id. at 323-24.

Analysis

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I. Retaliation

Defendants assert that plaintiff is precluded from bringing the retaliation claim because he notified BOLI after the close of the filing period. The relevant statute is former Or. Rev. Stat. § 654.062(6)(a) (2005), which states in part:

Any employee or prospective employee alleging to have been barred or discharged from employment . . . in violation of this . . . section may, within 30 days after the employee or prospective employee has reasonable cause to believe that the violation has occurred, file a complaint with the Commissioner of the Bureau of Labor and Industries alleging such discrimination under the provisions of ORS 659A.820.

Or. Rev. Stat. § 654.062(6)(a) (2005) (emphasis added). The standard for timeliness for reporting retaliation for safety violations is elaborated in former Or. Admin. R. 839-003-0025(5) (2005):

(5) A person alleging discrimination for reporting or opposing unsafe or unhealthy work conditions under ORS 654.062 must contact the division within 30 days of having reasonable cause to believe that such violation has occurred. An employee would have reasonable cause to believe a violation has occurred on the earliest date that the employee:

(a) Believed retaliation had occurred against the employee for opposing employee health and safety hazards; and

(b) Knew or should have known of the right to file a complaint with the division and of the requirement that the complaint be filed within 30 days of the alleged retaliation.

(A) If a notice required by OSEA, as provided in OAR 437-001-0275(2)(a), was properly posted in the employee's workplace, continuously on and following the date of the alleged retaliation, the division will find that the employee knew or should have known of the 30-day filing requirement.

(B) If the employer failed to post the required OSEA

poster, the 30-day filing requirement will begin on the date the employee learned of the right to file a complaint and of the 30-day filing requirement. The employee may establish this date based on the employee's own statement or other evidence offered by the employee.

(C) If the employer disagrees with the employee's presented date as the date the employee learned of the right to file a complaint, the burden is on the employer to show that the employee knew or should have known on an earlier date.

Or. Admin. R. 839-003-0025(5) (2005) (emphasis added).

At issue is the type of notification required under Or. Rev. Stat. § 654.062(6)(a) (2005) and Or. Admin. R. 839-003-0025(5) (2005). Reading subsection (5) of Or. Admin. R. 839-003-0025 in isolation, plaintiff argues that under this standard, plaintiff had 30 days from the date on which he reasonably believed that he was discriminated against to "contact the division," that is, BOLI. Under this interpretation, plaintiff contends that his act of notifying BOLI of his termination on November 2, 2005, constitutes a qualifying "contact."

Defendants assert that the type of "contact" required under the statute and rule is the filing of a complaint. Defendants' reading is the more plausible construction. As noted above, Or. Rev. Stat. § 654.062(6)(a) (2005) states that an aggrieved employee may "file a complaint" with BOLI within 30 days of reasonably determining that reasonable cause to believe that a violation has occurred.

The regulation, in turn, states that, in discrimination cases, the plaintiff "must contact the division within 30 days of having reasonable cause to believe that such violation has occurred," and explains that reasonable cause is present when the plaintiff believed he or she suffered retaliation and "[k]new or

1 should have known of the right to file a complaint with the
2 division and of the requirement that the complaint be filed
3 within 30 days of the alleged retaliation." Or. Admin. R. 839-
4 003-0025(5)(a)-(b) (2005) (emphasis added). Thus, the rule
5 requires the plaintiff to have knowledge that the law requires a
6 complaint to be filed within 30 days in order to trigger the
7 filing period.

8 Because plaintiff's knowledge about this requirement and
9 specifically about the mode of notifying BOLI -- by filing a
10 "complaint" -- is a prerequisite to the commencement of the
11 limitation period, it defies logic that the agency would intend
12 to then dilute the act of notification itself to a simple
13 instance of "contact" with the agency. Further, the remaining
14 subsections of the rule consistently refer to the 30-day "filing
15 requirement" and reference the triggering date on which the
16 employee "learned of the right to file a complaint," indicating
17 that one particular method of BOLI notification -- filing a BOLI
18 complaint -- inheres in the timeliness requirement. Or. Admin.
19 R. 839-003-0025(5)(b)(A)-(C) (2005). Thus, when construed within
20 the context of the entire rule, and within the context of the
21 statute that the rule interprets, I understand the type of
22 "contact" required under Or. Admin. R. 839-003-0025(5)(2005) is
23 the filing of a complaint. See PGE v. Bureau of Labor and
24 Industries, 859 P.2d 1143, 1146 (1993) (analysis of text and
25 context of statute is primary step in construction); Roseburg
26 Forest Products v. Hardenbrook-Hardy, 171 P.3d 393, 395 (Or. App.
27 2007) (applying same interpretive framework to administrative
rules).

Under the regulation, a "complaint" is a "written, verified

statement signed by the complainant or complainant's attorney," and it is deemed "filed" when received by BOLI. Or. Admin R. 839-003-0005(4), 839-003-0025(2). Indeed, plaintiff's initial BOLI questionnaire (received by the agency on November 17, 2005) recited, "This is not an official complaint; completing the questionnaire is a preliminary step."

Plaintiff filed his BOLI complaint on December 7, 2005. The parties agree that, at latest, plaintiff would have become reasonably aware of the alleged retaliation against him on October 24, 2005, when he received his termination letter. The record also indicates that plaintiff had actual notice of the 30-day requirement no later than November 3, 2005, when he read a BOLI intake form that stated, "your discrimination complaint must be filed within thirty (30) days from when you believe you have been discriminated against." Because the BOLI complaint was filed on December 7, 2005, outside the 30-day period, plaintiff exceeded the filing period, and the claim is untimely. Defendants' motion for summary judgement is granted with respect to plaintiff's retaliation claim.

II. Wrongful Termination

Defendants assert that plaintiff's wrongful termination tort claim is precluded under Oregon law because adequate statutory remedies exist to redress the alleged harm. This court has held that a claim for common law wrongful discharge is not available in Oregon if: (1) an existing remedy adequately protects the public interest in question; or (2) the legislature has intentionally abrogated the common law remedies by establishing an exclusive remedy (regardless of whether the courts perceive

that remedy as adequate). Draper v. Astoria Sch. Dist. No. 1C, 995 F Supp 1122, 1128 (D. Or. 1998), abrogated in part on other grounds by Rabkin v. Or. Health Sciences Univ., 350 F3d 967 (9th Cir. 2003).¹ The court's inquiry into the adequacy of available statutory remedies does not attend to whether plaintiff's statutory claim under Or. Rev. Stat. § 654.062 has not withstood summary judgment. As Magistrate Judge Stewart has explained, "inquiring into the adequacy of remedies as a matter of law does not first require a determination as to the merits of the claims. Instead, the only inquiry is whether an alternative claim, if proven, provides an adequate remedy." Minter v. Multnomah County, 2002 WL 31496404, at *14 (D. Or. May 10, 2002).

Plaintiff seeks back pay, compensatory damages, punitive damages, and attorney fees and costs. Complaint at 7-8. The statutory remedies available to plaintiff under Or. Rev. Stat. § 654.062(5) consist of two years' back pay, injunction and reinstatement, and attorney fees and costs. Or. Rev. Stat. § 659A.885(1). Notably, those remedies do not include compensatory or punitive damages, which may be available to a wrongful discharge plaintiff under Oregon tort law. As such, that statute "is inadequate to protect employees from a wrongful discharge caused by resisting employment discrimination." Cantley v. DSMF, Inc., 422 F Supp 2d 1214, 1222 (D. Or. 2006).

Defendants argue, however, that the availability of any

¹The matter has been complicated by an Oregon Court of Appeals opinion, Olsen v. Deschutes County, 127 P3d 655, 660 (Or. App. 2006), rev denied, 136 P3d 1123 (Or. 2006), which held that both elements must be established in order to preempt a wrongful discharge claim. This court has determined that, in the absence of any Oregon Supreme Court precedent, either element would suffice. Cantley v. DSMF, Inc., 422 F. Supp. 2d 1214, 1222 (D. Or. 2006).

adequate remedy is the focus the court's inquiry, and that where any statute in the universe of federal or state law would offer a plaintiff the types of remedies provided under a wrongful termination tort claim, wrongful termination is precluded, whether plaintiff alleged relief under the alternative claim or not.

In defendant's view, plaintiffs could have (and should have) invoked relief under 29 U.S.C. § 660(c), which permits a person aggrieved by discrimination on the basis of reporting safety violations to seek "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." In support of its argument, defendants cite the unpublished opinion in Dooijes v. K & B Transportation, No. CV-04-608-MO, *1 (D. Or., Aug. 2, 2005), in which the court dismissed plaintiff's single wrongful termination claim on the basis that an adequate federal statutory remedy existed under the Surface Transportation Assistance Act, a statute that plaintiff apparently had not invoked.

The court rejects defendants' argument, taking significant guidance from Cantley v. DSMF, Inc., 422 F. Supp. 2d 1214, 1222 (D. Or. 2006). In Cantley, the court addressed and rejected the applicability of Dooijes in a case factually similar to the one at bar. In Cantley, as here, the plaintiff was terminated allegedly in retaliation for voicing workplace safety concerns, and brought claims under Or. Rev. Stat. § 654.062 and wrongful termination. As here, the plaintiff was challenged on the wrongful termination claim, on the basis that adequate statutory remedies were available. As here, the defendant in Cantley cited Dooijes v. K & B Transportation, No. CV-04-608-MO, *1 (D. Or.,

Aug. 2, 2005) in order to argue that existing remedies precluded plaintiff any redress through a wrongful termination claim.

1 The Cantley court explained that the Dooijes was
2 inapplicable, in part because Dooijes did not account for recent
3 iterations of Oregon case law that shift focus from whether an
4 available statutory remedy protects the interest at issue to
5 whether remedies invoked by a plaintiff offer the same redress as
6 a wrongful termination claim. Cantley, 422 F. Supp. 2d at 1222-
7 23. The case on which the Dooijes court relied was Walsh v.
8 Consolidated Freightways, Inc., 563 P.2d 1205, 1208 (Or. 1977),
9 in which an employee terminated allegedly for voicing workplace
10 safety concerns asserted a wrongful termination claim. Walsh
11 held that the plaintiff's wrongful termination claim was
12 precluded where OSHA provided for equitable relief. The Cantley
13 court explained that, in the years after Walsh was decided,
14 Oregon courts place greater emphasis on examining "whether the
15 available remedies under the pertinent statute adequately address
16 the personal injuries suffered by plaintiffs who lose their jobs
17 due to discriminatory acts." Id. at 1221. It did not address
18 the propriety of considering the applicability of a statutory
19 remedy that plaintiff had apparently not invoked, but in light of
20 the Cantley court's analysis of intervening developments in
21 Oregon law, the value of Walsh as authority to support such a
22 practice seems diminished.

23 In this case, even if it were appropriate to include in the
24 court's inquiry relief under a statute that plaintiff had not
25 invoked, it is not clear that remedies under 29 U.S.C. § 660(c)
26 would provide the full range of relief afforded by wrongful
27 termination. 29 U.S.C. § 660(c) permits an employee aggrieved by

discrimination in retaliation for reporting workplace safety concerns to file a complaint with the OSHA Secretary. Where a violation is found, the Secretary may bring an action on the complainant's behalf in district court, where the judge may award "all appropriate relief including rehiring or reinstatement of the employee to his former position with back pay." 29 U.S.C. § 660(c). Although the First Circuit has held that "all appropriate relief" can include compensatory and exemplary damages, Reich v. Cambridgeport Air Sys., Inc. 26 F.3d 1187, 1194 (1st Cir. 1994), I have found no authority in the Ninth Circuit on this question.

The Cantley plaintiff apparently did not invoke 29 U.S.C. § 660(c). However, even after having considered Walsh, which held that wrongful termination was precluded by the availability of remedies under the federal OSHA statute, the Cantley court did not dismiss the plaintiff's wrongful termination claim on the basis that a federal remedy existed under 29 U.S.C. § 660(c). Rather, it evaluated the statutory remedy that plaintiff did invoke under Or. Rev. Stat. §§ 654.062 and 659A.885(1) and explained that because the statutes provided no compensatory and punitive damages, the wrongful termination claim was not precluded. I adopt the reasoning of the court in Cantley. Because the statutory remedies that plaintiff has invoked under Or. Rev. Stat. §§ 654.062 and 659A.885(1) do not afford punitive or compensatory damages, plaintiff's wrongful termination is not precluded. Defendants' summary judgment motion on this basis is denied.

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Conclusion

1 Defendants' motion for summary judgment (#31) is granted in
2 part and denied in part.

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4 IT IS SO ORDERED.

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6 Dated this 15 day of February, 2008.

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10 THOMAS M. COFFIN
11 United States Magistrate Judge
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